Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

REPLY COMMENTS OF THE DIRECT MARKETING ASSOCIATION

Respectfully submitted,

Gerald Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030

Ian D. Volner
Heather L. McDowell
Venable LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-4800
Counsel for DMA

February 2, 2006

SUMMARY

In these Reply Comments, DMA responds to opposition to the establishment of an exemption to allow non-profit trade and professional associations to omit an opt-out notice on every fax sent to members in furtherance of the associations' tax-exempt purpose. Those few commenters who oppose the exemption seem to resist based on misperception of the nature or scope of the exemption that the JFPA allows; in fact, the exemption we support is narrow and limited to a discrete and unique group of recipients.

In addition, we ask the Commission to reaffirm that any exemption, whether for nonprofits or based on an established business relationship, extends to a marketer's agent when the agent is acting on behalf of that marketer.

We also strongly urge the Commission not to attempt to further define or limit certain terms and requirements in implementing the established business relationship provisions of the JFPA, or adopt inflexible tests to apply them. The FCC should likewise avoid rigid or narrow views of what constitutes a "clear and conspicuous" opt-out notice. The Commission can not turn every "horror story" into a regulation, and categorical approaches to these standards – which do not need further refinement in the regulations – would not serve the public interest and will not work.

DMA also responds to comments concerning recordkeeping requirements and the content of fax advertising or opt-out notices. There is no basis for the Commission to mandate that senders maintain specific records. Organizations that send promotional faxes must have the flexibility to choose what records to keep, and how to keep them consistent with their own economic and operational needs. The JFPA also does not authorize the Commission to add to the elements it mandates for inclusion in an opt-out

notice. The JFPA speaks for itself on these matters, and the Commission should not add to them or prescribe the content of an advertisement or mandatory opt-out notices. The Commission should, however, make clear that if the telephone numbers(s) a sender identifies pursuant to the requirement to include a domestic telephone and fax machine number are themselves "cost-free," that the sender may, but is not required to include an *additional* cost-free mechanism.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

REPLY COMMENTS OF THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association, Inc. ("DMA"), hereby submits these reply comments in connection with the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking[1] to establish regulations implementing the Junk Fax Prevention Act of 2005 ("JFPA").[2] Specifically, DMA responds to opposition to the establishment of an exemption to allow non-profit trade and professional associations to omit an opt-out notice on every fax sent to members in furtherance of the associations' tax-exempt purpose. We also strongly urge the Commission not to attempt to further define or limit certain terms and requirements in implementing the established business relationship provisions of the JFPA, or adopt inflexible tests to apply them. The FCC should likewise avoid rigid or narrow views of what constitutes a "clear and conspicuous" opt-out notice. DMA also addresses comments regarding the definition of a "sender," the content of faxes or opt-out notices, and recordkeeping proposals.

---

1 In re Junk Fax Prevention Act of 2005, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking and Order*, FCC 05-206 (Released Dec. 9, 2005) (hereinafter "NPRM at ¶ __").

2 Pub. L. 109-21 (2005).

I. Exemption for Non-Profit Trade and Professional Associations

DMA and many other interested parties have asked the Commission to adopt an exemption permitting nonprofit professional and trade associations to send unsolicited fax advertisements to their members in furtherance of their tax-exempt purposes without including an opt-out notice in every fax. In fact, the vast majority of commenters support such a limited exemption. Those few who do not seem to resist based on misperception of the nature or scope of the exemption that the JFPA allows, and perhaps, to some extent, less familiarity with nonprofit associations.

First, we stress once again that the only fax promotions at issue are those sent to *members* of the exempt nonprofit trade or professional association. Thus, concerns that the exemption would "confuse" consumers or place undue burden on them are overstated and unpersuasive. These recipients have a different relationship with their association than members of the general public do with other organizations. Unlike an individual faced with an unanticipated fax communication from an entity with whom he or she might have less frequent contact, members of trade and professional associations have taken affirmative steps to join, and pay dues to remain members. They are fully expecting to get regular communications, including faxes, with important information and opportunities from the associations to which they belong. These individuals are thus in frequent contact with the association and actively participate in its activities; many take on leadership roles. Members have abundant information and means to contact the association to indicate that they do not want to receive unsolicited faxes, without requiring the association to include a notice on each fax.

Second, the exemption will not disadvantage any other marketing entity. The exemption DMA advocates would simply allow nonprofit associations to omit an opt-out notice on each fax they send to members in furtherance of their tax exempt purposes; it would not relieve associations from allowing members to opt-out and honoring such requests. The JFPA makes clear that the Commission may only create the exemption if it determines that a notice on every such fax is not needed to protect these unique recipients' ability to stop the association from sending such unsolicited fax advertisements to them.[3] The law does not relieve them of the obligation to honor such requests. As DMA and others have demonstrated, the opt-out notice is not necessary: These nonprofit associations exist to serve their members, and can be expected to continue to afford them ample opportunity to convey their preferences. Thus, no other marketer is disadvantaged by having to provide an opt-out notice on unsolicited facsimiles it may send to members of an exempt association[4] when the association itself does not – both entities would still be obliged to accommodate recipients' preferences and honor their request not to receive unsolicited fax advertisements in the future. Some recipients might express a preference for faxes from their associations, and only opt-out of promotional faxes from commercial marketers, but the JFPA was not enacted to flatten distinctions among different offers. Rather, it was enacted to ensure the continued viability of facsimiles as a promotional tool while protecting recipients' ability to avoid such solicitations. Creating an exemption for nonprofit trade associations to omit an opt-out notice in faxes sent to members achieves that goal.

---

[3] Pub. L 109-21 Sec 2(e) *to be codified at* 47 U.S.C. § 227(b)(2)(F).

[4] Of course, such an organization would, like a nonprofit trade or professional association, also have to have an established business relationship with the recipients.

Third, as DMA and others have explained, the Commission need not become embroiled in difficult questions about an association's tax-exempt purpose or whether its actions further such purposes. In order to comply with the requirements of existing tax law, only an insubstantial amount of a nonprofit organization's activity may be unrelated to its tax-exempt purposes. Thus, the Commission should adopt a rebuttable presumption that a facsimile solicitation sent by such an association to one or more of its own members *is* "in furtherance of the association's tax exempt purpose." To address rare situations where a fax might fall outside that presumption, the Tax Code is again instructive, because it establishes a tax when such tax-exempt organizations regularly carry on a trade or business that is not substantially related to the organizations' tax-exempt purposes.[5] The Commission, therefore, does not need to establish new definitions or criteria for determining whether an organization's activities are "related," and should apply the definitions and criteria established in the Tax Code and its accompanying regulations. To do otherwise will compound confusion and the potential for conflict.

Finally, the Commission must make clear that the exemption extends to associations' agents when the agent is acting on behalf of the association.[6] Consistent with the Commission's TCPA rules in relation to telephone solicitations by or on behalf of nonprofit organizations,[7] a nonprofit should not be forced to sacrifice its exemption simply because it acts through an agent.

---

5 26 U.S.C. § 512(a).

6 *See* Comments of the Attorneys General of Arkansas, Connecticut, Kentucky and New Mexico at 27 (hereinafter "State Comments at ___").

7 *See, e.g.*, In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order* 18 FCC Rcd. 14014, 14089-90, ¶ 128.

II. The Commission Must Avoid Rigid Rules in Implementing the Established Business Relationship and Opt-Out Provisions of the JFPA

DMA very strongly opposes suggestions that the Commission attempt to set finite boundaries or definitions of certain terms and requirements in the JFPA, or worse, adopt inflexible "tests" to apply them. For instance, the Commission itself asked whether or not it should "establish parameters defining what it means for a person to provide a facsimile number 'within the context of an [EBR].'"[8] Some commenters have urged the Commission to adopt or otherwise apply "bright-line" tests to determine whether or not the communication of a fax number was "voluntary," or whether or not an opt-out notice is "clear and conspicuous." Others ask the Commission to declare that certain actions categorically may not constitute an EBR or a "voluntary" communication of a fax number. The JFPA did not direct or otherwise grant the Commission any specific authority to define or otherwise embellish these terms. Moreover, DMA believes that in these areas, the Commission must avoid a rigid approach and that clarification or refinement of these standards must largely be resolved on a case-by-case basis.

A. The Meaning of "Established Business Relationship"

Some parties in this rulemaking argue that the Commission should adopt rules or otherwise construe an "established business relationship" ("EBR") to alter the definition as set forth in the JFPA. A group of state Attorneys General, for instance, press the Commission to "expressly limit the EBR to only those advertisers with whom the recipient has entered into a contract or from whom the recipient has purchased goods or services."[9] They also ask the Commission to put new gloss on the meaning of an inquiry, contending that it should not be based on "causal" communication and must have been

[8] NPRM at ¶ 10.

[9] State Comments at 8-9.

"initiated" by the fax recipient (which terms the states themselves do not define). Privacy Rights Clearinghouse argues that the Commission should abolish an inquiry-based EBR.[10] The Commission must reject any proposal to modify – expressly or in the guise of interpretation – the definition of an EBR as set forth in the JFPA.

The JFPA explicitly defines an "established business relationship": It is the definition in effect under the Commission's TCPA rules in effect on January 1, 2003, except that it extends to business as well as residential subscribers. Hence, the Commission is compelled to define and EBR as

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[11]

Apart from allowing the Commission to consider imposing time limits on an EBR, the JFPA does not grant the Commission any authority or discretion to alter or limit this definition.

DMA again stresses that there is no basis for imposing limits on the duration of an EBR. There are affirmative reasons - set forth in comments submitted by DMA and others – not to impose any time limit. Moreover, the Commission has not initiated an appropriate proceeding to make the determinations required by the JFPA as a predicate for imposing such limits,[12] and the record in this proceeding does not support them either.

---

10 Comments of Privacy Rights Clearinghouse at 3.

11 47 C.F.R. § 1200(f)(4) (as of January 1, 2003).

12 Pub. L. 109-21, Sec. 2(f).

Finally, there is no basis for the Commission to categorically prohibit all affiliate "sharing" of EBRs.[13] DMA believes that as long as an organization's reliance on an EBR is consistent with reasonable consumer expectations, that is sufficient. For example, a "consumer" – in most cases a business - may in some instances form an EBR with more than one entity as part of a single transaction or inquiry. In addition, affiliated entities may independently form EBRs yet share data because it is more efficiency; this may result in overlap but the Commission must clarify that it is permitted. In short, there is again no justification for bright-line rules prohibiting affiliates from "sharing" EBRs.

B. The Meaning of "Voluntary"

It must first be noted that in this area, the JFPA introduces some new standards for sending promotional facsimiles. Even if the JFPA had authorized the Commission to embellish these standards, the agency has not yet accumulated the substantial enforcement experience necessary to justify an attempt to refine or modify them.

A determination of what constitutes a "voluntary" communication of a fax number is not susceptible to a bright-line test. Such a finding is too heavily dependent on the specific factual scenario in which someone provides a fax number. And it appears that some of the "standards" commenters advance are nothing more than extrapolations of discrete – and often extreme – examples of unwanted faxes, to ensure that a specific scenario is categorically deemed not "voluntary." Ultimately, they are overbroad and unworkable.

The variety of different examples that commenters set forth help illustrate the difficulty in attempting to convert examples into regulations – it is impossible for the Commission's regulations to identify or anticipate *every* example of an "involuntary" or

[13] *See, e.g.*, State Comments at 11; Biggerstaff Comments at 23-24.

"voluntary" communication of a fax number, whether from the recipient in the context of an EBR,[14] or through a directory, advertisement, or Internet site.[15] The Commission can not turn every "horror story" into a regulation, and categorical approaches to these standards – which do not need further refinement in the regulations – would not serve the public interest and will not work.

For example, the Electronic Privacy Information Center ("EPIC") contends that communicating a fax number in a directory is only "voluntary" if the individual "has explicitly stated that they wish to receive unsolicited faxes."[16] This standard would eviscerate the EBR exception that the JFPA commands the Commission to reinstate. In effect, EPIC appears to ask the Commission to require that a sender obtain an explicit request for a fax *in addition* to having an EBR. The JFPA plainly prohibits such a requirement and the Commission must reject the suggestion.

As another example, Mr. Biggerstaff argues that "mandatory or practically mandatory releases of fax numbers" may never be deemed "voluntary."[17] DMA disagrees. Viewed *in context*, a decision to proceed with a transaction or inquiry that requires one to supply a fax number might indeed remain voluntary; it is simply impossible to know or decide absent an understanding of the circumstances under which the fax number was or will be supplied, which in turn should answer questions such as, what sort of inquiry or transaction was involved, who was party to it and what is or was

---

14 Pub. L. 109-21, Sec. 2(a) *to be codified at* 47 U.S.C. § 227(b)(1)(C)(ii)(I).

15 *Id*. at § 227(b)(1)(C)(ii)(II).

16 EPIC Comments at 1. EPIC would apply a similar standard to the provision of a fax number on a website. *Id*. at 2.

17 Comments of Robert Biggerstaff at 15 (hereinafter "Biggerstaff at __"). It is not at all clear what Mr. Biggerstaff hopes to encompass within "*practically* mandatory," but it obviously falls far short of an appropriate legal standard to embody in a regulation.

the nature of their relationship, and what sort of disclosures or promises were made or exchanged.

The argument that a number can *only* be "voluntarily" supplied for use by one entity, and that list re-sale or revisions automatically render its further use "involuntary" is also unavailing.[18] There is simply no basis to assume that any business or individual would believe or agree that sharing, revising, or reusing a fax number they supplied would in all cases automatically bar use of the data by someone else. It is possible that at *some* point the connection between a recipient's communication of a fax number and the sender's acquisition of it would become too attenuated to consider the communication "voluntary," but that point can not be established by bright-line, "one-size" approaches. Furthermore, the fact that a sender must also have an EBR with the recipient should act as a safeguard against over-zealous use of data not supplied directly to a sender, or closely tied to the sender's own EBR data.

The Commission must bear in mind that the issue of what is "voluntary" will arise only where there is *already* an EBR between the sender and recipient. Section 2(a) of the JFPA reinstated an exception to a general ban on unsolicited fax advertising only where there is an EBR *and* the sender obtained the fax number through voluntary communication from the recipient, or from a directory, advertisement, Internet site to which the recipient voluntarily supplied the number for public distribution. Thus, the Commission's JFPA rules would not specify how marketers may or may not obtain fax numbers to send unsolicited fax ads at will to the general public, which the TCPA unmistakably prohibits. Rather, these terms come into play exclusively when there is already an underlying relationship between the sender and recipient.

---

[18] *Id*. at 17-18.

Viewed in this light, DMA believes that if the Commission makes any assumptions about what constitutes a "voluntary" communication of a fax number, such standards ought to enable senders to rely predominantly on the EBR, with less emphasis on how the number was obtained. For instance, with one exception,[19] the Commission could consider a rebuttable presumption that if the sender obtains a fax number directly from the recipient, the number was communicated "voluntarily." Along the same lines, the Commission could consider a rebuttable presumption that a number obtained from a general telephone directory or on a website operated or maintained by the recipient (or the recipient's employer) is communicated voluntarily unless its is accompanied by a clear and conspicuous disclosure limiting the use of such numbers for purposes of sending unsolicited fax advertisements.

DMA is ***not*** suggesting that these are the only circumstances in which a fax number is communicated voluntarily. Yet, if the Commission determines to offer more guidance, then it must take into account the fact that each scenario starts from the premise that there is an EBR in place between the sender and the recipient.

C. The Meaning of "Clear and Conspicuous"

The limitations discussed above also preclude more precise definition of "clear and conspicuous."[20] The possibilities for crafting required opt-out notices – taking into account both content and format options – are virtually limitless. Some notices will be

---

19 The Commission long ago made clear that the automatic (and undisclosed) capture of automatic number identification ("ANI") by a telemarketer is not sufficient to establish a business relationship. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd. 8752, ¶ 31. DMA believes that the limitation is warranted, yet it is also a longstanding interpretation that should be applied with equal force under the JFPA as it has under the prior FCC regulations.

20 *See* Pub. L. 109-21 Sec. (c) *to be codified at* 47 U.S.C.§ 227(b)(D)(i). On a related issue, DMA agrees with commenters who propose that the Commission rules should treat a fax cover sheet, when used, as the "first page" of an unsolicited fax advertisement.

clear and conspicuous, and others may not, but the final assessment depends on the net impression of each fax advertisement.

DMA also notes that regulators, courts, and marketers are familiar with this term and its meaning – as a matter of law and in practical application. We submit that the phrase does not need further elaboration for purposes of implementing the JFPA through new regulations. The Commission should make clear only that in the context of the JFPA, what is to be judged "clear and conspicuous" is, as in other applications, to be based on an *objective* standard of *reasonableness*; it is not subjective or tied to the actual impression or misimpression of any particular individual(s). Thus, a notice that is sufficiently clear and prominent that it is readily noticeable by a reasonable consumer should be considered "clear and conspicuous."[21]

The Commission might elect to outline some of the *factors* it would consider in making a determination, such as placement, type size, font, color or contrast, and proximity to other information. Such factors should not be considered exhaustive, nor should any single factor be determinative.

Finally, DMA believes that if the Commission intends to establish criteria that define or refine the meaning of "clear and conspicuous," it must present a specific proposal through a Further Notice of Proposed Rulemaking, thereby affording interested parties an opportunity to comment not only the propriety of taking such action, but also on a proposed course of action. As it stands, stakeholders can only guess as to what range of possibilities the Commission might pursue, if any.

---

[21] Thus, as an example, the Commission should not require that the disclosure be "actually" noticed, since this seems to embody a subjective standard requiring that a particular recipient in fact see an opt-out notice. State Comments at 15-16.

D. The Applicable Burdens and Recordkeeping

In connection with the issues discussed above, several parties offer proposals for how the Commission should allocate the respective burdens of senders and recipients. Either independently or by extension, some also propose a myriad of recordkeeping requirements. DMA submits that there is no justification to alter otherwise applicable rules of law requiring that a complainant bear the burden of proving their claim – that is, that the one who sent a fax violated a law or regulation. Nonetheless, we also recognize that, faced with a challenge, a sender may bear the burden of demonstrating that it had an EBR with the recipient and obtained the fax number through a means permitted under the JFPA. As discussed above, it may be appropriate for the Commission to establish certain limited, rebuttable presumptions in this regard.

There is, however, no basis – nor any authority in the JFPA – for the Commission to mandate that senders maintain specific records. The JFPA does not speak to recordkeeping. Vast differences in the size, nature, and operations of organizations that send fax advertisements also render broadly applicable recordkeeping obligations impractical. Senders will obviously make individual recordkeeping choices with the understanding that, absent adequate records, a recipient's sworn claim that no EBR existed or the receiving fax number was not voluntarily supplied may prevail. Nevertheless, organizations that send promotional faxes must have the flexibility to choose what records to keep, and how to keep them, consistent with their own economic and operational needs.

III. Defining A "Sender"

The Commission's NPRM focuses on a variety of proposed requirements for the "sender" of a fax, but also asks about application of the rules to "fax broadcasters."[22] A variety of commenters have noted that it may be advisable for the Commission to define or clarify who may be a "sender" under the JFPA rules. DMA generally believes that it may be useful to clarify that the "sender" for JFPA purposes is the entity or entities whose products or services are promoted in the fax. The Commission must, however, make clear that an EBR between a recipient and the entity whose product or service is promoted in a fax extends to that entity's agent while acting on behalf of that principal. That is, an agent who transmits fax advertisements on behalf of "Sender A" may rely on the EBR of its principal for faxes sent on behalf of Sender A. Although an agent or fax broadcaster may not automatically rely on a principal's EBR in order to send faxes on behalf of a *different* principal, an advertiser should not be deprived of the opportunity to rely on the JFPA exception for EBR faxes simply because it outsources promotional work. In the same vein, an opt-out request should apply to the sender – that is, the entity(ies) whose products or services are promoted – rather than its agent.

IV. Fax or Opt-Out Notice Content

A variety of parties have urged the Commission to prescribe the content of fax advertisements or opt-out notices required under the JFPA.[23] The JFPA, however, expressly states the only required elements, and does not authorize the Commission to

---

22 NPRM at ¶ 25.

23 *See, e.g.*, State Comments at 12, 18, 20, 21,

add to them.[24] The JFPA speaks for itself on these matters, and the Commission should not prescribe the content of either an advertisement or mandatory opt-out notices.

The Attorneys General also propose that the domestic fax and telephone numbers identified in an opt-out notice be different. This is unnecessary, even to avoid the states' concerns about the limitations of "send-only" fax machines. The JFPA requires that the number(s) "permit an individual to make [an opt-out] request at any time on any day of the week." The Commission's rules may not and need not require anything different.

The Commission should make clear that if the telephone numbers(s) a sender identifies pursuant to the requirement to include a domestic telephone and fax machine number are themselves "cost-free," that the sender may, but is not required to include an *additional* cost-free mechanism. For example, senders that identify a toll-free number as their contact point for accepting opt-outs should not be required to provide a second cost-free contact point.

CONCLUSION

For the foregoing reasons, DMA asks that the Commission adopt a limited exemption to allow non-profit trade and professional associations to omit an opt-out notice on every fax sent to members in furtherance of the associations' tax-exempt purpose; avoid any attempt to further define or limit certain terms and requirements in implementing the established business relationship provisions of the JFPA; reaffirm that

[24] Specifically, the notice must only: (1) be clear and conspicuous; (2)appear on the first page; (2) state that the recipient request not to receive future unsolicited fax advertisements to a fax machine and that failure to comply with a proper request in the time period the Commission prescribes is unlawful; (3) includes a domestic contact number and fax machine number for the recipient to submit an opt-out request; and a cost-free mechanism for the recipient to do so; and (4) explain that an opt-out is valid only if it identifies the number of the fax machine(s) to which it relates, is made to one of the contact points required by the rules; and the requester does not later give the sender express invitation or permission to send such advertisements. Pub. L. 109-21 Secs. 2(c) and (d) to be codified at 47 U.S.C. §§ 227(b)(2)(D) and (E).

an exemption for nonprofits or based on an established business relationship extend to a marketer's agent when the agent is acting on behalf of that marketer; and decline suggestions to impose detailed recordkeeping requirements or prescribe the content of fax advertising or opt-out notices.

Respectfully submitted,

Gerald Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030

Ian D. Volner
Heather L. McDowell
Venable LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-4800
Counsel for DMA

February 2, 2006